United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To Be Argued by WILLIAM SONENSHINE, ESQ.

DOCKET No. 76-1103

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1103

UNITED STATES OF AMERICA,

Appellee,

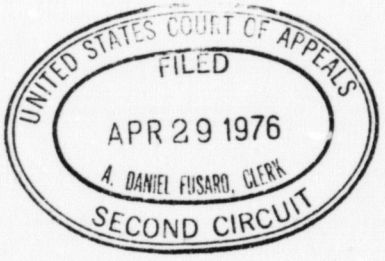
-against-

MICHAEL CHARLES VESCERA, JR.
and ANTHONY FERRANTE,

Defendant-Appellants.

On Appeal From the United States District
Court for the Eastern District of New York

BRIEF IN BEHALF OF APPELLANTS MICHAEL CHARLES VESCERA, JR. and ANTHONY FERRANTE



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PRELIMINARY STATEMENT

Appellants Michael Charles Vescera, Jr. and Anthony Ferrante appeal from judgments of conviction entered on February 24, 1974 in the United States District Court for the Eastern District of New York after a trial before Hon. Henry Bramwell, United States District Judge and a jury.

Indictment No. 73 CR 108, filed January 30, 1973, charged appellants herein and three other defendants, Otto John Heidel, Steven Murgatroyd and Anthony Lanza with possessing merchandise stolen from a foreign shipment (18 U.S.C. §659) (Count One), possessing merchandise

unlawfully removed from a bonded warehouse (18 U.S.C. 549) (Count Two) and a conspiracy to possess these items (18 U.S.C. §371) (Count Three).

A motion to suppress physical evidence, namely, the property in question and other items, was denied after hearing before Judge Bramwell on September 5, 1975.

The case of appellants Vescera and Ferrante was severed and resulted in their conviction on all three counts on December 11, 1975.

On February 24, 1976, appellants were each sentenced to terms of imprisonment of seven years on Count One, two years on Count Two and five years on Count Three, to run concurrently. Both were released on bail and are presently at liberty thereto.

Appellants Vescera and Ferrante have each filed a timely Notice of Appeal.

THE SUPPRESSION HEARING

The Evidence

Special Agent ROBERT NADLER testified on direct examination that in the "latter part" of October, 1972, a confident informant who had never before furnished any information told him that Anthony Ferrante and unidentified others were operating a "drop" for stolen goods in a building, address unspecified, located in the area of Metropolitan and Flushing Avenues, Brooklyn (20, 26-28).* As a result of this information, Nadler testified, he and other agents went to the area and concluded that the particular building the informant was referring to was a warehouse located at 1956 Flushing Avenue, and they began to "spot check" the building (28). (A-1-2)

Also in the "latter part" of October, 1972, on a date stated to be "approximately" October 26th, Nadler had the Elk's Bar on Flushing Avenue under surveillance and followed a car driven by someone he knew to be Anthony Ferrante north on Flushing Avenue and eventually to the rear, Troutman Street entrance of the warehouse at 1956 Flushing Avenue. Nadler testified that he saw Ferrante enter this rear door and reappear 15 minutes later carrying an unidentifiable carton, which he put in his car and took back to the Elk's Bar (28-33).

On November 10, 1972, the witness and an agent Collins had the Flushing Avenue warehouse under surveillance when they observed

* References are to hearing minutes.

(207-231; Gov't Exh. 26).

a green step van leave from a garage door on the front (Flushing Avenue) side of the building and drive south to the corner of Stewart and Ten Eyck Avenues, Brooklyn, where a "Dempsey Dumpster" trash receptacle was located. Nadler testified that two individuals, identifiable only as "white males", tossed some cartons from the van into the receptacle (33-34)*. The agents followed the van back to the warehouse, and the agents returned to the dumpster (35). A search of the receptacle, Nadler testified, revealed various cartons from which labels had been cut out; however, "some labels" were found in the dumpster and one label said "Tioga Industries". Sometime thereafter Nadler stated he was informed by someone at his office that on October 22, 1972 a truck "containing Tioga material" had been hijacked in Brooklyn (35-36). Also, Nadler stated, an "investigation" by himself and an agent Keely led them to conclude that "these cartons had been on that particular truck that was hijacked" (37). (A-3-4).

On the morning of November 15, 1972, Agent Nadler heard from the confidential informant once again. He testified that the informant told him that there had been a burglary the previous weekend, either November 11th or 12th, at an air freight company in Queens and that various items of merchandise stolen in this burglary, including whiskey and chemicals, were located at 1956 Flushing Avenue and would be moved out that morning using two rental trucks. This burglary had

*The appearance on page 33 of this date as November 19, 1972 is apparently a typographical error in view of all the subsequent testimony by this witness and others.

been reported to the New York office of the FBI (38-39).

Upon receiving this information, Nadler testified, he and other agents set up surveillance of the Flushing Avenue warehouse, arriving there at approximately 9:00 a.m. (39-40). They observed the following events: At about 11 a.m. a black 1969 Ford with a "whip" antenna parked behind a 4G's rental truck on Troutman Street outside the rear entrance to the building (40-46). The driver of the Ford, who was the defendant Heidel, and the sole passenger of the Ford, who was the defendant Murgatroyd, left the car and entered the rear door of the building ; about five minutes later Murgatroyd exited, got into the 4G's truck and drove it around the block to the front of the warehouse and through the building's vehicular entrance (47-48). A half-hour later, the appellant Ferrante arrived and entered the front pedestrian door of the warehouse (48-49). About 45 minutes later, Murgatroyd left via the front door, walked across the street to a Sunoco station and obtained an air compressor, which he took back with him into the warehouse; shortly thereafter, the 4G's truck left the premises and pulled into the Sunoco station, where Murgatroyd exited the truck and returned the compressor (50-54). At this time, Ferrante and the defendant Lanza left the front pedestrian door; Ferrante waved to a Hertz truck parked on Flushing Avenue; the truck pulled into the open garage door, which closed behind it (55-58). Simultaneously with this, the 4G's truck departed the Sunoco station, followed by the black Ford (58).

Shortly thereafter, Nadler testified, he heard over his radio

house that he and his wife owned in Brooklyn, and had never been

that other members of his group had stopped the 4G's truck on the street, opened it and found numerous cases of scotch (59). Hearing this, Nadler ran to the front of the warehouse with Agent Pyle; Pyle knocked on the garage door and identified himself as the FBI; this was followed by the sound of running footsteps inside the warehouse 60-61). Pyle and Nadler ran around the corner to Troutman Street, where Nadler saw Agents Armstrong, Strand and Sandige holding three individuals in custody: Ferrante, Lanza and the appellant Vescera (61-62). Looking through the rear door of the warehouse Nadler was able to see large amounts of scotch whiskey on the floor, as well as cigarettes and Tanqueray gin (63).

On cross-examination, Nadler initially claimed that his first contact with the informant in October was on the telephone, that the information he received from the informant on November 15th was also on the telephone, and that he had met personally with the informant "two or three times" in between those dates (65-69). After he was required to present certain records for an in camera inspection by the Court, Nadler acknowledged that the above account was incorrect. His first contact with the informant in October was in person, and this was the only time they met in person. He thereafter spoke to the informant twice on the telephone, first on November 8th and then on the morning of the 15th (139-148). Upon further questioning, Nadler acknowleged that the November 8th call had nothing to do with the premises in question (186).

Nadler also testified that while the informant was unable to

anyone about it or touched it or helped to load it, and denied renting

give him the address of the building and could only state its "vicinity", the informant was able to describe the building as having a pedestrian door with a "peep-hole" to the right of an "overhead metal door" on the Flushing Avenue side and another door on Troutman Street (149-150). The agent then acknowledged, however, that there were "quite a few" buildings in that vicinity with the same kind of door arrangement (154-155). Upon being asked to view photographs of the front of the building taken on November 15, 1972, the witness could not point out the "peep-hole" on the photographs (Def. Exh. A; Ct. Exh. 1; 158-163). While these photographs showed there was a sign on the front door, the informant had not mentioned any sign (163). However, Nadler remembered the informant had mentioned the presence of decals on the door (173). Upon viewing the photographs again, he could not point out the decals (174).

Nadler also testified that on the day after he spoke to the informant for the first time, he spent several hours in the neighborhood of the warehouse "verifying" the location (72, 78-80). Thereafter, commencing on October 23rd, he conducted "spot checks" of the premises, which consisted of remaining briefly in the area to see if there was any activity (83, 125-127, 151). The observation of the appellant Ferrante leaving the Elk's Bar on October 26th was not as a result of the informant's information (170-171). None of the "spot checks" revealed any noteworthy activity except for the November 10th "Dempsey Dumpster" episode (181-182). On approximately November 5th, Nadler secured permission to use the Sterwood Express building across from 1956 Flushing Avenue for surveillance

He told the men he only had one available but would make arrangements

purposes, but this site was not put into use until November 15th (218-220).

With respect to the November 10th "Dempsey Dumpster" incident, Nadler testified that he made his observations from a block and a half away and estimated that the men he saw threw some 10 to 15 cartons into the receptacle, which was 25-30 feet long by 4-5 feet wide by six feet high (190-192). According to Nadler, although nobody watched the dumpster during the 20 to 30 minutes while he was following the green van back to the warehouse, he assumed the cartons he recovered from the receptacle were the ones he had seen being tossed in because they "laid on top" of whatever else was in the dumpster (192-195). Nadler later acknowledged, however, that photographs taken of the contents of the dumpster that day fairly represent the amount of refuse in it, and that at least some of the cartons did disappear down into the dumpster (Court's Exh. 3-6; 336).

With respect to the labels purportedly recovered, Nadler initially testified that only ont "Tioga Industries" label was recovered from the dumpster, and that it was on a carton, and that it was preserved as evidence (35 [direct]: 209, 235) later, he gave the following testimony:

> "Q [by Mrs. Rosi..] Now, you of course also sifted through the other things that were in the dumpster looking for labels and papers, is that right?
>
> A. I am sure we did.
>
> Q. What exactly did you remove and preserve as evidence from the dumpster, apart from the cartons?

"A. There were some labels, Tioga labels.

Q. How many:

A. I don't recall.

Q. One or more than one?

A. More than one.

Q. Give us an approximate number of how many Tioga labels there were, your best recollection.

A. Strictly a guess, I would say five to ten.

Q. Would you describe for us physically what they looked like in size, color or printing?

A. Just said Tioga Industries, as far as I can recall.

Q. All you know is it said Tioga Industries?

A. Yes.

Q. How big were the labels?

A. Average sized labels.

Q. I don't know what average sized labels are, How many feet or --

A. Approximately --

* * * [Colloquy]

Q. Were these labels, Agent Nadler, plain paper or cardboard or what kind of material?

A. I would say a type of paper.

* * * [Colloquy]

THE COURT: I don't see any reason for asking what

the labels looked like.

Were they paper labels?

THE WITNESS: Yes

THE COURT: Approximately what size?

THE WITNESS: Three, four inches long, possibley.

THE COURT: By how much?

THE WITNESS: Typical labels, maybe three inches." (238-240).

Thereafter, Nadler was asked to read from his report concerning the finding of labels. This report revealed that the cartons, "some of which contained metal bands with the address cut of", contained labels reflecting the names of various shippers and shippees including a Tioga Textile of New York and a Tioga Textile of York, Pennsylvania (245-246). (11-24-25) Lastly on the subject of labels, Nadler conceded on recross examination that he couldn't really tell when the labels he recovered went into the Dempsey Dumpster of if they related to this case at all (336).

With respect to the information from the informant on November 15th, Nadler testified that the informant, in telling him that the Flushing Avenue premises contained goods stolen in a particular warehouse theft, mentioned the fact that the theft of which he spoke had been reported in the newspaper (201). Nadler also testified that when he went to the premises on the morning of November 15th he had "no idea" and "no indication" whether the merchandise was still in the building (281-282). Nadler further testified that he never applied for a search warrant for

the Flushing Avenue premises, but that he was in constant radio contact with his office and could have gotten in contact with the United States Attorney in a matter of moments (284).

With respect to Nadler's actions at the warehouse after the 4G's truck had been stopped, he testified that his purpose was to "identify the individuals that were [still] inside the warehouse, and to "see what they had in there" (307). When he looked into the back door of the premises after seeing the three men in custody, he could not tell based upon what he saw then whether the items were stolen shipment (312).

Special Agent JOHN F. GOOD testified that he was stationed in the vicinity of the Flushing Avenue warehouse on November 15, 1972 and that he had an Agent McGoey stopped the black Ford and 4G's truck a minute or two after it left the Sunoco station, and removed the drivers (344-347). While the agents were passing the vehicles in order to pull them over, they observed Heidel, who was driving the Ford, talking on a radio, and Murgatroyd, who was driving the truck, using a "handy-talkie" [Gov't Exh. 1] (348). Agent McGoey opened the rear of the truck and saw cases of liquor bearing the name "Fenton Hill", which was one of the companies involved in the losses from a burglary the agents knew about (354). Heidel and Murgatroyd were thereupon advised that they were under arrest (360). These agents radioed their fellow agents to apprise them of what they had done (356). Then they took their prisoners back to the Flushing Avenue warehouse, where a search was in progress (360-361).

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On cross-examintion, Good stated that he received no instructions to stop the vehicles, but that it was his intention from the time he heard that the vehicles were leaving the area to stop them and arrest the occupants (381). Heidel and Murgatroyd were in custody before anyone looked into the truck (385). Good further testified that in the hour and a half that the 4G's truck was observed to be in the warehouse, noone attempted to get a search warrant (409). Nor did anyone attempt to search the truck at the Sunoco station (412).

Special Agent THOMAS ARMSTRONG testified that he was stationed in a surveillance truck on the Troutman Street side of the warehouse when he heard over the radio that the truck had been stopped by Agent Good (441). At that point Agent Nadler directed him over the radio to join agents Strand and Sandige in a car parked in front of the Troutman Street door of the premises; Nadler announced that he was going to the front door (442). Shortly after Armstrong joined his fellow agents in the car he observed the door opening and saw three individuals exit, the first two of whom had begun to run (442-443). Strand and Sandige apprehended the first two, Lanza and Vescera, and handcuffed them while Armstrong apprehended the third man, Ferrante, and handcuffed him (443-444).

Then, Armstrong testified, he stood in the doorway and looked into the premises, where he observed cartons of Scotch whiskey and cigarettes (444-445). He entered the building and walked through it hurriedly to see if anyone was still inside (445). Upon doing so he saw

numerous items of merchandise (452-453). The other agents brought the prisoners into the building and began to search it (454).

On cross-examination, Armstrong testified that no agent had looked into the rear door until all three of the men who exited were in custody: these individuals were taken into custody based upon the radio communication that Agent Good and his partner had found contraband in the truck: anyone who left the building thereafter would have been taken into custody (488-489).

Special Agent GORDON C. STRAND testified that he and his partner, Agent Philip Sandige, were advised on the morning of November 15, 1972 of the "possibility" that proceeds of the Queens warehouse burglary were located at 1956 Flushing Avenue (542). Strand and Sandige went to the scene and parked nearby, listening to the radio communications (543-545). After hearing that the truck was stopped they were directed to guard the rear door of the premises while other agents were going to make "an approach" to the front side (546). After they pulled up next to the rear door they were joined by Agent Armstrong and shortly thereafter the three individuals - Lanza, Ferrante and Vescera - came running out the door (546-548). The three were apprehended, placed against the wall and handcuffed, and taken inside the premises (549-550).

On cross-examination, Strand testified that, given the instructions he received, he intended to arrest anyone who walked out the door (566). He was told over the radio that the agents approaching the front of the building were doing so in an attempt to make entry (568).

Special Agent W. PHILLIPSANDIGE testified that he was with Agent Strand on November 15th and repeated Strand's account of the pertinent events of that day (578-585).

On cross-examination, Sandige also stated he would have arrested whoever came out the door (627).

Other Proceedings at the Hearing and Concessions by the Government

During the initial phases of the cross-examination of Agent Nadler in which he testified to having had two telephone conversations and two or three personal meetings with the informant, Nadler was asked to provide the specific dates of these contacts. He stated that he could not do so without looking at his records, and the Court directed that he do so over the luncheon recess (65-71, 84). When Court reconvened, however, the Assistant United States Attorney announced that the FBI would not permit these records to leave its offices for a "security reason". In addition, the Government now objected to any questioning of Nadler designed to elicit the actual dates of his conversations with the informant on the grounds that such questions were "not relevant" and "designed solely to disclose the identity of the informant" (85-86). (A-5-6) During the ensuing colloquy, the Court denied the following defense applications: To require the witness to testify to the actual dates of his contacts with the informant; to require the Government to file an in camera affidavit stating reasons for its claim that such testimony would jeopardize the informant; to require the

(A-6-16)

Government to identity the informant in camera (86-96; 99-103). The Court then resolved the matter by requiring only that the agents records revealing the dates of his contacts with the informant be disclosed in camera (134). (A-18) It was upon this examination that the agent corrected his testimony as to the number and nature of his contacts with the informant (139).

After the close of the Government's proof on the hearing, the attorney for the defendant Lanza called upon the Government to produce for inspection the labels that Agent Nadler testified had been presented as evidence, and the Court granted such application (634-636). After a brief recess, however, the Court was informed that the labels and cartons had been destroyed (638;659-660). The Court was further informed that the Tioga "investigation" failed to result in any arrest or complaint (649-652, 660). The defendant's motion to strike from the record any testimony about the labels was denied (638-640; 661-662). (A-26-29)

The Court's Ruling on the Motion to Suppress

The Court ruled that the agents had probable cause to stop and search the 4G's truck and that the discovery of stolen merchandise inside the truck gave the agents probable cause to arrest Lanza, Vescera and Ferrante who had been inside the premises with the truck. The Court further ruled that, having arrested these individuals and seen a large quantity of liquor through the open door, the agents acted reasonably in entering the building to protect themselves and the evidence. Having

done so, the Court ruled, the agents had the right to seize anything in plan view. The Court therefore denied the motion to suppress in all respects (735-740). (A-30-34)

THE TRIAL

The Government's Case

STEVE CALASCIONE, manager of Air Freight Warehouse, Queens, N. Y., a United States Customs bonded warehouse, testified that the bonded area of the warehouse had been burglarized in the early morning hours of November 12, 1972, and certain items, which he was able to inventory, had been stolen. A separate bonded area of the warehouse leased to Fenton Hill American had also been broken into. Approximately one week later the FBI returned some of the items stolen from the warehouse, including essence of perfume, paintings, watch bands, chemicals and several firearms, worth an aggregate of approximately $40,000. The warehouse log and bills of lading reflecting the original entry of the items into the warehouse were received in evidence, as were the items themselves (44-76; Gov't Exh. 1-10)*.

ROBERT McSWAIN, warehouse manager for Fenton Hill American, testified that his company ran the duty free shop for the British Airways Terminal at Kennedy Airport and stored liquor and cigarettes under customs bond at the Air Freight Warehouse, numerous cases of which were stolen in the November 12th, 1972 burglary. Most of these cases had

* References are to trial minutes

"Fenton Hill" stamped on them, and were returned to the company by the FBI on November 17, 1972. An inventory list of the missing items and a photograph and some samples of the recovered items were received in evidence (78-99: Gov't Exh. 11-13).

Special Agent ROBERT C. NADLER testified to his observations of 1956 Flushing Avenue, the arrest of the appellants and the search of the warehouse on November 15, 1972 in substantially the same way he related them at the suppression hearing (109-153).

On cross-examination, Nadler conceded that in none of his observations of that morning did he see appellant Vescera. He did not see Vescera in conversation with anyone, nor did he see Vescera touch, possess or excercise control over any of the goods seized, nor did a subsequent fingerprint examination reveal Vescera's fingerprints on any item (160-168).

With respect to the incident where he knocked on the vehicle door of the premises and heard footsteps running, Nadler agreed that his report was accurate in stating that the footsteps belonged to one person, an "unidentified male" (162-164).

Nadler also conceded that appellant Ferrante's fingerprints were not found on any item (191).

Special Agent JOHN F. GOOD testified to his activities on the day in question as he had at the suppression hearing, specifically the stopping and searching of the 4G's truck and the search of the green step van inside the warehouse, which revealed a U.S. Customs lock

(207-231; Gov't Exh. 26).

Special Agent THOMAS L. ARMSTRONG testified to his observations of the rear of the Flushing Avenue warehouse on the day in question as he had at the suppression hearing, including his arrest of the appellant Ferrante, who had walked out of the rear door (243-250). Armstrong also testified that he found a gun (Gov't Exh. 27) with a serial number the same as that of one stolen from the Air Freight warehouse (253).

On cross-examination, Armstrong stated that he had not seen Vescera at any time that day prior to moment of his arrest at 12:47 p. m. (257).

Special Agent PHILLIP SANDIGE testified to his activities at the rear of the warehouse on the day in question as he had at the suppression hearing, including his arrest of the appellant Vescera, who had run out the rear door a distance of approximately 20 feet when he was stopped (268-274). Sandige also testified to the search of the premises and the seizure of various exhibits, including cigarettes, liquor, perfume oils and firearms, previously identified as having been stolen from the Air Freight warehouse, and a hand truck (275-283; Gov't Exh. 29).

On cross-examination, Sandige testified he had not seen Vescera at all on the day in question until he was arrested leaving the premises (314). Sandige further testified that the Hertz rental agreement was never submitted for handwriting comparison on for fingerprints (320, 335). Sandige also testified that Steven Murgatroyd was the lessee of

the Flushing Avenue premiser and that the agents found a lost of material relating to an alarm business there (321, 341).

Special Agent RONALD W. KOSEDNAR testified that he searched the appellant Vescera at the FBI office in Manhattan and recovered, among various items of personal property, an unsigned, unvalidated New York State chauffeur's license in the name of Joe Gantz, 4330 East 4th Street, New York City (369).

On cross-examination, Kosednar acknowledged that an inventory of property in Vescera's possession at the time of his arrest indicates that a driver's license was found and returned to Vescera (375).

ALFRED JONES testified that he was a U.S. Customs warehouse officer assigned to the Air Freight warehouse in November, 1972 and that the customs lock in evidence (Gov't Exh. 26) was on a bathroom door at the warehouse at the time of the burglary (378-379).

DUCHENE MARTIN testified that he was a warehouseman employed by Fenton Hill American ltd., and that the hand truck (Gov't Exh. 78), was his, but he had not seen it since the November, 1972 burglary (383-384).

Special Agent CHARLES K. BOLING testified that he searched Steven Murgatroyd at FBI headquarters after his arrest and found three documents with numbers notations concerning brand names and quantities of whiskey chemicals and other items (387-391; Gov't Exh. 41-43).

The Appellant Vescera's Case

MICHAEL CHARLES VESCERA, testifying in his own behalf, stated that he was 38 years old, married with two children, lived in a

house that he and his wife owned in Brooklyn, and had never been convicted of any crime. On the evening of November 14, 1972, he was in the Elk's Bar with appellant Ferrante who owned the bar, when they struck up a conversation with Steve Murgatroyd, whom Vescera had known from the bar for about six months. Murgatroyd was in the burglar alarm business and the conversation dealt with the prospective installation of burglar alarms in their houses. An appointment was made for them to go to Murgatroyd's place of business, 1956 Flushing Avenue, between noon and one o'clock the next day. When Vescera arrived at 12:30 he entered through the Troutman Street door and saw that Ferrante was already there, standing towards the front of the building with Anthony Lanza, whom he also knew from the Elk's Bar. Vescera also saw the warehouse filled with merchandise and two men, whom he did not know, exiting from a truck at the front of the building. As Vescera walked through the building he picked up a driver's license lying on the floor and asked if it belonged to anyone. Ferrante told him to hold onto it and give it to Steve Murgatroyd when he saw him. He was in the rear of the building talking to Ferrante and Lanza when he heard someone yell to someone else "let's get out of here" and saw the two men from the truck run up the stairs and out the door. Thinking they might have been thieves, Vescera ran out the door after them and was arrested by the FBI.

Vescera testified that he had no knowledge of the stolen character of the merchandise in the warehouse, had never spoken to

anyone about it or touched it or helped to load it, and denied renting any vehicle that day (440-459).

On cross-examination, Vescera stated that while he had known Heidel from the Elk's Bar he had not seen him on November 15th and did not accompany him to the 4G's truck rental agency that day. He testified further that he saw the two unknown men put rollers against the side door of the truck and could hear the truck being loaded. He asked them about the license he had found and they said it wasn't theirs. When the FBI arrested him he was thrown up against the wall so quickly he did not have a chance to say anything to them (460-475).

Vescera testified that he did not see Lanza and Ferrante leave the building after he walked in, did not see the Hertz truck pull in, and only took notice of the cases of liquor and not the other items (493-497).

On recross-examination Vescera testified that he had never seen Ferrante handle any merchandise or converse with the men loading the truck (523-524).

The Appellant Ferrante's Case

Appellant Ferrante rested without calling any witnesses (527).

The Government's Rebuttal Case

ALLAN SILVERMAN testified that he was President of 4G's Truck Renting, Brooklyn, New York. On the morning of November 15, 1972, two men came into his establishment and asked to rent two trucks.

He told the men he only had one available but would make arrangements for them to rent a second truck through a friend of his who had a Hertz franchise. On November 20th he was interviewed by some FBI agents who showed him eight or ten photographs. All of the photographs looked similar to the men who had rented the trucks on November 15th, but he picked out the two photographs that looked the most similar and signed the backs of them (648-665).

On voir dire examination Silverman stated that the agents told him his truck had been involved in a theft and they wanted him to look at photographs of men who possibly rented the truck. Most of the pictures looked similar, Silverman stated, and he "can't swear" that he was correct and cannot identify the person today and cannot be sure that the two men in the pictures were the men who rented the truck (665-670).

The two photographs were received in evidence (670; Gov't Exh. 45, 46). The Court instructed the jury that Exhibit 46 was a photograph of Vescera and Exhibit 45 was a photograph of Heidel, and that each photograph was taken as a result of the arrest in this case (673).

On cross-examination, Silverman stated that he could not state "emphatically" that the photographs he selected were the men, and that he was only doing what he thought was "the right thing" in making the selection (693).

Special Agent THOMAS L. ARMSTRONG resumed the stand and testified that he had the rear door of 1956 Flushing Avenue under obser-

vation from approximately 12:28 until the appellants were arrested, except for one brief moment when he saw the Hertz truck move and drive around the corner. He did not see anyone leave the door before the appellant Vescera came out (705-708).

On cross-examination Armstrong stated that his report which stated that he was on the sidewalk when Vescera exited was incorrect and that he recalled, as he had previously testified, being seated in a car at the time (736).

Special Agent MATTHEW L. MULLIN testified that he took certain photographs through the open velucular door of the warehouse after the arrests. The photographs (Gov't Exh. 44, 52) were received in evidence (756).

The Appellant Vescera's Surrebuttal Case

LEONORA VESCERA testified that she had been married to appellant Michael Vescera for 16 years, that they lived together with their children and that she was presently a student at Kingsboro Community College. She recalled that on November 15, 1972, Michael who was a general contractor, and a friend, Joseph D'Acunto were at home until the time she left the house at 11:30 a.m. to pick up their daughter at school (770-772).

On cross-examination, Mrs. Vescera stated she remembered the events of that day because it was the day her husband was arrested, and that she, her husband and D'Acunto all had left the house together (773-774).

JOSEPH D'ACUNTO testified that he worked for his father at the Fulton Fish Market and that on the morning of November 15, 1972, he arrived at the Vescera home at about 10:00 a.m. to deliver some fish and stayed for about an hour with Michael and his wife. The next day he learned that Michael had been arrested (776-778).

On cross-examination, Mr. D'Acunto testified that he was certain that he, Michael and Michael's wife all left the house together (779). He testified further that he heard his father were friends of Mr. & Mrs. Vescera, that he always brought them fish for the holidays. that when he brought the fish on November 15th he had stayed for coffee, but that he couldn't remember bringing fish to the house on other specific dates (779-787).

Other Proceedings at the Trial and Rulings by the Court

On cross and recross-examination of Agent Sandige, issue was taken with the agents claim that a pair of gloves was found at the Flushing Avenue premises. The agent conceded that the gloves had neither been preserved as evidence nor listed on the rather extensive and detailed inventory of property, while such items as a baptismal certificate and a social security card had been both retained and listed (326-329, 340). On redirect-examination, Sandige reiterated that the gloves were found lying on the floor and that he himself had seen them (334). On recross-examination, Sandige was again asked about the gloves not being reserved and whether or not certain other items were preserved, whereupon the

following question and answer occurred:

"Q. You did preserve and retain the yellow and blue watch cap found in the premises?

A. Yes. It was believed to have been used in another crime - " (336-337). (A-35-36)

A side bar discussion between the Court and counsel ensued, during which counsel did not move for a mistrial, but did ask the Court to instruct the jury to completely disregard the agent's gratuitous statement. The Court then gave the following instruction:

'THE COURT: Ladies and gentlemen of the jury, the Court requests that you disregard the last statement that the witness made, that the item was evidence of some other crime. There is no influence or presumption that these individuals on trial were involved in any other crime and if they are involved in this one, that you should find for yourselves.

Just as there is no influence or presumption that these individuals were responsible for the theft at the Air Freight warehouse, there is to be no influence or presumption that they were involved in another crime" (338). (A-37)

On further redirect-examination, Agent Sandige was permitted to state, over defense objection, that the name on the baptismal certificate and social security card was of a 'George Harris" and the documents were received in evidence over the defense's continued objection that these items were irrelevant, not connected to appellants and prejudicial

(342-347).

At the close of the Government's direct case the Court denied each appellants' motion to dismiss each count of the indictment for failure to make out a prima facie case (401-413).

After the foregoing, appellant Ferrante moved for a protective order precluding the Government from inquiring into his one and only conviction, which was a 1971 state misdemeanor conviction for third degree possession of stolen property in Nassau County, New York in 1968, involving the possession of some thirty pairs of shoes, for which appellant received a sentence of three years probation (422-423, 428-429). (A40-43) In the course of the ensuing colloquy the Court stated that it was "disturbed" over the fact that the Court had granted the same motion in another trial in which Mr. Ferrante was acquitted, and that "the Court cannot continue to overlook the fact that Mr. Ferrante's possessive actions". The Court also stated "If I had permitted [use of the prior conviction] in that trial, Mr. Ferrante might have had another problem" (429). (A-43) When counsel protested the Court's consideration of the prior acquittal as a rationale for denying appellant's motion, the Court stated it would not consider it (430). The Court then proceded to deny the motion for a protective order, stating that if appellant Ferrante took the stand the Court would permit the Government to introduce the prior conviction under Rule 404(b) as a "prior similar act" (438). (A-44)

The Court also announced it would refuse to instruct the jury that evidence of consciousness of guilt by one defendant was not attributable to another (571).

Prior to the witness Allan Silverman taking the stand on the Government's rebuttal, the prosecutor turned over reports of several FBI agents who had already testified in the case, which had not previously been turned over when those agents testified, as "3500 material" pertaining to the witness Silverman. Although the Court indicated to the prosecutor that he had violated his obligation to turn over all prior statements of these agents at the time they testified, the Court permitted Mr. Silverman to testify over defense objections that his testimony constituted improper rebuttal and that the withholding of the FBI reports pertaining to him constituted an improper attempt to "mousetrap" the appellant Vescera, who had already testified in his own behalf (580-592).

Prior to the witness Silverman taking the stand, the Court held a Wade hearing out of the presence of the jury. Silverman testified that a few days after November 15, 1972, he was shown five or six photographs by FBI agents who told him that they may have included the man who rented the truck from him. Silverman further stated that he picked out two photographs which "could have been the guys" who took the truck (593-607). At the close of this hearing the Court denied defense motions to suppress the identification testimony (625-635).

POINT I

THE GOVERNMENT FAILED TO PROVE THE EXISTENCE OF AN INFORMANT AND THUS FAILED TO PROVE PROBABLE CAUSE: THE COURT BELOW ERRED IN FORECLOSING INQUIRY INTO THE APPARENT FABRICATION OF THE INFORMANT' EXISTENCE

In Point II of this brief we contend that the unidentified "confidential informant" who allegedly spoke to Agent Robert Nadler on the morning of November 15, 1972 was unreliable and that the bare and uncorroborated tip upon which the arrests and seizures on that date were based did not provide the necessary probable cause. Before reaching that point, however, it is appellants' initial contention herein that the Government failed to prove the very existence of an informant (and/or his information), and therefore failed ab initio to sustain its burden of proving the existence of probable cause for these warrantless searches. We further contend under this heading that the single agent's dubious testimony concerning the informant was an apparent fabrication, which the Government shielded from proper scrutiny via an unsubstantiated claim of "security" and which the Court below prepossessingly accepted, unfairly foreclosing cross-examination and other truth-testing procedures, despite overwhelming indicia that the informant in this case was illusory.

We do not make the claim of fabrication lightly. We feel that a reading of the testimony of Agent Nadler, the only person who purportedly had contact with the informant and upon whose testimony alone this entire

issue rests, leaves the distinctive odor of disbelief.

It is difficult to recount and catalogue each vagueness, inconsistency or transparent embellishment which makes up this impression. In our view the most effective argument we can make in this regard is to urge this Court to read the testimony for itself. What follows, then, is a list of what we consider to be the main indicia of falsity.

¶The refusal of the agent to testify to anything more specific than the "approximate" dates of his contacts with the informant. Questions on cross-examination seeking the actual dates were successfully objected to by the Government on the bare assertion that knowledge of the dates would somehow reveal the identity of the informant, whose life would then be in jeopardy (86;89;91-96). (A-6;8;11-16) The Government also successfully avoided a defense request that the Government make an in camera showing to justify its contentions in this regard (87-88; 96). (A-7-8,16) When the Government was finally required to produce in camera information concerning the dates of the agent's contacts with the informant, the agent drastically revised his testimony (see discussion, infra).

¶The major variation between the agent's testimony, and his report concerning the number and nature of his contacts with the informant, and the Government's attempted concealment thereof. After initially claiming to have had at least four contacts, including "two or three" personal meetings with the informant prior to receiving the November 15th tip (65-69), Nadler drastically changed his testimony, after the Court examined certain documents in camera, to a total of one contact with the

(A-19-21)
informant relevant to this case prior to November 15th (139-148). These were notes which the witness was directed, at the morning session, to produce after the luncheon recess and which the prosecutor, upon returning to court in the afternoon, strenuously objected to producing and took it upon himself not to produce, for a "security reason" (85-86). (A-5-6)

¶The complete absence of detail in the agent's testimony concerning the substance of the informant's information. On direct examination, Nadler stated that the informant merely told him that Ferrante and unnamed others were operating a "drop" in a building in the vicinity of Flushing and Metropolitan Avenues, and that an investigation was then conducted to locate the building (20; 26-28). (A-1-2) One is therefore led to conclude from the agent's testimony that the informant provided no information whatsoever identifying or describing the other persons, the nature or source of the stolen property, the details of the operation or the actual location - and that the agent didn't ask. Significantly, when pressed on cross-examination as to any further details which the informant may have supplied, Nadler claimed for the first time that the informant had described the door arrangement (which he then conceded was the same as that of numerous buildings in the area) and the existence of a peephole (which he could not locate when confronted with photographs of the building) (149-150; 154-155; 158-163). (A-22)

¶The major discrepancies and the unexplained destruction of evidence concerning the cartons and labels in the Dempsey Dumpster. On direct examination, Nadler claimed that the cartons he allegedly

recovered were the same ones he had seen being tossed in half an hour before because they were teed up on top of the pile of litter in the dempster. He also claimed that when he recovered the cartons he discovered that all of the identifying labels had been cut off them, save for one label marked "Tioga Industries" which he concluded "upon investigation" was from a stolen shipment (35-37). On cross-examination, after being shown pictures of the huge, rubbish-filled receptacle, Nadler conceded that the cartons he had seen being tossed would have to have disappeared down into the dumpster (192-195; 336). With regard to the labels he recovered, he now claimed there were as many as ten. Asked to describe the mysterious Tioga labels he investigated, the agent could state little more than that they were "average" and "typical labels" (238-240). A reading of the agent's report then revealed that the cartons which were recovered bore the labels of numerous concerns, including not one but two companies named Tioga, and that only some addresses had been cut off some of the cartons (245-246). (A-24-25) No details whatsoever into the investigation of the Tioga label were revealed, and the Government conceded at the end of the hearing that there had never been a complaint or arrest against anyone in the Tioga case (649, 652, 660). (A-27) Although Nadler testified that the labels and cartons had been preserved, the Government, upon being asked to produce them, conceded at the end of the hearing that they had been "destroyed" (638, 659-660). (A-26-27)

¶The agent's apparent interest in Ferrante and knowledge of the Flushing Avenue warehouse for some unspecified reasons unrelated

to the informant. Several days after purportedly speaking to the informant for the first time, Nadler had Ferrante under surveillance at the Elks Bar and followed him from there to the warehouse and back (170-171). While nothing in this episode is either inherently incredible or fails to ring true, the agent's interest in Ferrante and knowledge of the Flushing Avenue premises supplies a motive and a context for fabrication.

It cannot be disputed that the Government bears the burden of proving facts establishing probable cause, including the existence of an informant and his information, when such is the basis for a warrantless search (e.g. United States v. Elgisser, 334 F2d 103 [2d Cir. 1964]). We feel in view of all the foregoing indicia of fabrication by the only agent who purportedly had any contact with the alleged informant in this case that the government has failed to sustain this burden. The agent's testimony is replete with contradiction, inconsistency, outright falsehood, cover-ups and the destruction of evidence. We urge this Court to find that the Government has failed to meet its burden.

We also contend that, in spite of all of the foregoing evidence that something was clearly amiss, the Court below unfairly foreclosed cross-examination and improperly refused to require that the Government make in camera showing to verify the existence of the informant. Instead the Court simply accepted Agent Nadler's testimony that there was an informant at face value while demonstrating an apparent reluctance to get involved in or to decide the serious issues of credibility that had

been raised. The following is a list of what we feel are the most significant events at the hearing which support the foregoing conclusions.

¶The Court declined to require the Government to make an in camera showing of how the informant would be in jeopardy if the dates were revealed (86-88).

¶The Court denied motions to have the Government identify or demonstrate the existence of the informant in camera, and never required that this be done (99; 108-109; 134). (A-17-18)

¶The Court sustained an objection by the Government to questions designed to elicit whether the informant received any compensation (123).

¶The Court announced it would not permit any cross-examiner to elicit the time of day Agent Nadler had contact with the informant on any date other than November 15th (207). (A-23)

¶The Court indicated that it was not interested in Agent Nadler's credibility on the issue of the labels (242-243).

¶The Court denied motions to strike the testimony about cartons and labels in view of their unexplained destruction (641).

¶The Court stated it would not make findings of fact because it did not feel there were any issues other than legal issues to be resolved (645).

¶The Court in its decision, made no mention whatsoever of the informant issue (735).

The facility with which government agents may invent "confidential informants" and the neccessity for trial courts to permit searching

inquiry when the spectre of such fabrication appears has long been a matter of concern to this Court (United States v. Coplon, 185 F. 2d 629 [2d Cir. 1950] [L. Hand, C.J.]). The other side of the "informant's privilege" coin is recognition of the serious potential for the abuse of the privilege and the neccessity for the Courts to vigilantly guard against fabrication (Roviaro v. United States, 353 U.S. 53 [1957]; also see Beck v. Ohio, 379 U.S. 89 [1964]. Some commentators, recognizing the existence of a somewhat stronger privilege at the suppression stage (McCray v. Illinois, 386 U.S. 300 [1967], fear the open invitation to invent probable cause using the convenient "Old Reliable", especially in nonwarrant cases (McCray v. Illinois, supra, 386 U.S. 300, 316 [Douglas, J. disenting]; see Comment, The Informer's Privilege in Criminal Cases, 1967 U. of Ill. L. Forum 665; also, see Comment, Informer's Word as the Basis for Probable Cause in Federal Courts, 53 Calif. L. Rev. 840 [1965]).

Mindful of the very real possibility of police perjury, the courts have devised various safeguards. New York State's highest court has recently announced a comprehensive procedure of in camera presentations and interrogations that are "designed to protect against the contingency, of legitimate concern to a defendant, that the informer might have been wholly imaginary and the communication from him entirely fabricated" (People v. Darden, 34 N.Y. 2d 177, 181-182 [1974]). The procedure in this Circuit is not as complex but potentially more rigorous for the Government. Where the informer's story constituted "the essence or core or main bulk" of the evidence of probable cause and there is no

on-the-scene corroboration of "critical details" which are almost sufficient to amo[illegible]o independent justification for an arrest, the informer's identity must be disclosed to the defense (United States v. Carneglia, 468 F. 2d 1084, 1089 [2d Cir. 1972]; United States v. Commissiong, 429 F. 2d 834, 839 [2d Cir. 1970]; United States v. Tucker, 380 F. 2d 206 [2d Cir. 1967]). In such cases, the court must do more than merely "take the agent's word for it" (United States v. Robinson, 325 F. 2d 391, 393 [2d Cir. 1963].

There can be no question that if probable cause existed in this case --a proposition which we vigorously dispute in Point II, infra -- then it existed entirely by virtue of the informant's November 15th tip. As we discuss more fully in Point II, that tip consisted of the naked statement that property stolen from an air freight warehouse burglary would be leaving the subject premises (the address of which the informant never provided) in two rental trucks (which were not otherwise described as to make, ownership, etc.) that morning. The extent of the on-the-scene corroboration of the "critical details" of this tip consisted of the observation of two rental trucks entering a warehouse and one leaving -- hardly suspicious, much less "critical", corroborative activity. We therefore maintain, in view of all the foregoing, that it was serious error for the court below to have foreclosed the various attempts by the defense to test the existence of the informant and the veracity of Agent Nadler. As we have already demonstrated, the court had the duty to promote a vigorous inquiry. It's failure to do so requires, at

the very least, that this court remand this case to the court below for a new hearing at which the informant must be produced or the indictment dismissed (Alderman v. United States, 394 U. S. 165).

POINT II

THE SEARCHES AND SEIZURES IN THIS CASE WERE INVALID FOR LACK OF PROBABLE CAUSE -- THE INFORMANT'S TIP FAILED TO PASS THE AGUILAR - SPINELLI TEST.

In Point I of this brief we contend, inter alia, that the Government failed to adduce any credible evidence of the existence of an informant in this case and thus failed to meet its burden of proving facts which establish probable cause.

Herein, we contend that even in the unlikely event that there was such an informant, there was still no probable cause because the informant and his tip were, according to every applicable legal standard, unreliable and uncorroborated.

We note prefatorily our view that there can be no questioning of appellants' standing to suppress the fruits of the warrantless search of the 40's truck and the Flushing Avenue warehouse, which they are charged with possessing (Simmons v. United States, 390 U.S. 377 [1968]; Jones v. United States, 362 U.S. 257 [1960]).

We would also be remiss if we did not note at the outset of the generally stricter standards to be applied for determining probable cause when the search has taken place without a warrant (see Beck v. Ohio, 379 U.S. 89 [1964]; Giordenello v. United States, 357 U.S. 480 [1959]; cf. United States v. Ventresca, 380 U.S. 102 [1965]).

It is essentially appellant's contention herein that the informant's tip in the instant case did not meet the venerable "two pronged" test enunciated in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), recently summarized by this court as requiring evidence to establish "(1) that the informer was in fact a reliable person, and (2) that the underlying circumstances by which he obtained his information were such that it was probably accurate "United States v. Canieso, 470 F2d 1224 [1972]). We further contend that, given the failure of the informant's tip to meet the Aguilar - Spinelli test, there were also no other "probative indications of criminal activity" to which the informant's tip may be added to establish probable cause under this court's decision in United States v. Canieso, supra.

The first prong of the Aguilar - Spenelli standard, that of the reliaibility of the informant, may be established by a recitation that the informant has previously supplied accurate information or that there is, in view of independent corroboration of the details of the tip, a "'substantial basis' for crediting the hearsay" (United States v. Harris, 463 U.S. 573, 580-581 [1971];United States v. Rollins, 522 F 2d 160, 165 [2d Cir. 1975])[1]. It is clear that the reliability of the informant has not been established here. It is conceded that the informant never before furnished any information. As for verifiable details, the information furnished initially in late October and the actual tip on November 15th were barren of them. The October information contained no address, no names or descriptions of confederates or their roles, no facts about the operation, the character of the property, where it came from, where it went, or how it got there. As for the November 15th tip, it described the property as coming from a burglary that had been heavily publicized in the news media, and stated that the property would be moved in two rental trucks that morning. The agents never saw any trace of the property until the search of the 4G's truck began. The trucks were not otherwise described and even if they had been, seeing such vehicles pull into a warehouse constitutes "corroboration"

1. None of the alternative factors which the court in Harris found to constitute such basis, ie. the reputation of the suspect, the background of the informer and the fact that the statement was against the penal interest of the informer, are present here.

of only the most innocuous, every-day sort of detail which must occur hundreds if not thousands of times daily in warehouses across the city. Significantly, the 4G's truck left the warehouse afternoon, not in the morning (49-50). Clearly absent are any real details concerning the who, what, when, where, how and why. Absent, too, are any signs of furtive or suspicious activity (cf. United States v. Canieso, supra; United States v. Carneglia, 468 F. 2d 1084 [2d Cir. 1972]).

The only possible "corroboration" the Government can claim here is the now-famous "Dempsey Dumpster" incident. We have already made clear our feelings about the veracity of Agent Nadler in regard to the mysteriously missing cartons and Tioga labels. We also submit that their unexplained destruction required that they be stricken from the record and that the court below erred in that regard (see United States v. Augenblick, 393 U.S. 348 [1969]; United States v. Hass, 482 F. 2d 38 [2d Cir. 1973]; United States v. Bryant, 439 F. 2d 642 [D.C. Cir. 1971]). However, even accepting the dumpster - cartons - labels incident at face value, it constitutes no corroboration at all. No information about the cartons was derived from the informant. No arrest or complaint ensued. The finding of one "stolen" label in a huge trash bin among numerous other labels (which, one must assume, were not stolen) that may have been on a carton that may have been tossed from a green van which had just been inside a warehouse would hardly mark the warehouse

2. The only evidence supporting the "stolen" character of the label is Agent Nadler's conclusory statement that an "investigation" determined it to be so.

as iniquitous even to the incomparable Sherlock Holmes. Indeed, the incredible Agent Nadler was forced to admit, during cross-examination, that he did not consider the event significant (242) and that he couldn't really tell whether the labels related to this case at all (336).

The second prong of the Aguilar - Spinelli standard, that of the underlying circumtances of how the informer received his information indicating its probable accuracy, is totally absent here. Significantly, Agent Nadler testified he could not recall whether the informant stated he was ever inside the premises! (155). Also significant is the fact that the burglary the informant referred to was highly publicized (201). There is no evidence of what the informant saw or heard. There are no details. The information he imparted "could easily have been obtained from an offhand remark in a neighborhood bar" (Spinelli v. United States, supra, 393 U.S. at 417).

Having failed the Aguilar - Spinelli test, the only way this tip can salvaged is if it can be added to probative indications of "criminal activity" to establish probable cause under United States v. Canieso, supra. What probative indications of criminal activity? The agents, it was conceded, observed no contraband and no inherently suspicious activity until they pulled the Ford and the 4G's truck over and searched the truck. While in the act of pulling the vehicles over, they testified, they observed the drivers of those vehicles each talking on a radio. Aside from the fact that these observations took place after the act of seizure had commenced and may not therefore be considered on the issue of probable cause, we

note that the court below indicated that it was not going to consider this aspect of the agent's testimony (705), and note further that observing someone using a car radio in these days of the Citizens' Band craze (see M. Harwood, America with its Ears On, N.Y. Times Magazine, April 25, 1976, p. 28) is hardly significant. In short, there was no probable cause even under Canieso.

A last point is the relationship of the warehouse search to the search of the 4G's truck. Obviously, given the appellants' standing to object to the search of the truck, the warehouse search is "poisoned fruit" (Wong Sun v. United States, 371 U.S. 471 [1963]). Should this court disagree for some reason we cannot forsee, we would contend that the search of the warehouse was invalid without a warrant under Coolidge v. New Hampshire, (403 U.S. 443 [1971]) and Chimel v. California, 395 U.S. 752 [1969]).

POINT III

APPELLANTS' GUILT WAS NOT PROVED BYOND A REASONABLE DOUBT BY LEGALLY SUFFICIENT EVIDENCE

Herein we contend that the Government failed to prove anything more than mere presence in the vicinity of contraband and mere association with the other individuals (Murgatroyd and Heidel) who were found to be in possession thereof, and thus, failed to prove appellants' guilt of either the possessory counts (Counts One and Two) on the conspiracy count (Count Three) of the instant indictment by legally sufficient evidence.

It is well settled that, absent evidence of actual possession, the prosecution must establish such a "nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession "(United States v. Casalinuovo, 350 F. 2d 207, 209 [2d Cir. 1965]).

In the instant case, ther was no proof that either appellant ever handled any contraband. The evidence showed little more than their presence in a warehouse which, it was shown at trial, housed a legitimate burglar alarm business. Bare presence, this Court has repeatedly held, "tells us nothing about what the defendant's specific function was and carries no legitimate, rational, or reasonable influence that he was engaged in one of the specialized functions connected with possession" (United States v. Kearse, 444 F. 2d 62, 64 [2d Cir. 1971]).

As for the conspiracy count, there was also no proof of anything greater than Ferrante's mere presence together with Murgatroyd and Heidel for a few brief minutes in the warehouse. Vescera, of course, was not even seen in or about the premises during any of the time Murgatroyd or Heidel were seen therein. There association is clearly insufficient proof of a conspiracy (e.g. United States v. Cantone, 426 F. 2d 902 [2d Cir. 1970]; United States v. Cimino, 321 F. 2d 509 [2d Cir. 1963]).

We submit that testimony that Ferrante waved in the direction of the Hertz truck which later pulled into the building and that both Ferrante and Vescera exited the premises when the FBI announced their presence at the front door is not sufficient to elevate mere presence into proof of possession beyond a reasonable doubt. It seems to us that evidence of flight, which has been widely recognized as the weakest, most equivocal sort of evidence of undifferentiated guilt (2 Wigmore, Evidence §276; People v. Leyra, 1 N.Y. 2d 199, 209 [1956]), goes only to the issue of knowledge of the stolen character of the goods - an element we are hardpressed to contest here in view of the presumption which follows from recent possession (e.g. United States v. Minieri, 303 F. 2d 550, 554 [2d Cir.], cert. denied, 371 U.S. 847 [1962] - and not to the independent requirement of possession. Human nature seems to be such that even a mere bystander might well attempt to flee a police raid if he has learned, or learns during the commotion, of the character of the property he is standing near.

In short, we feel that there is significantly less evidence here than what this court found to be a close case in United States v. Carneglia, 468 F. 2d 1084 (2d Cir. 1972).

It should be noted that we are not unmindful of the testimony by the witness Silverman that he picked out a photograph of appellant Vescera as looking "similar" to one of the men who rented the trucks from him on the day in question. This testimony, of course, does not affect the issue of legal sufficiency with respect to the appellant Ferrante, who rested after the denial of his motion at the close of the Government's direct case (United States v. Rosengarten, 357 F. 2d 263, 266 [2d Cir. 1966]). With respect to appellant Vescera, we contend this evidence was extremely weak and also that it was improperly admitted (see discussion, infra).

POINT IV

APPELLANTS WERE DEPRIVED OF THEIR RIGHT TO A FAIR TRIAL

A. The FBI Agent's Gratuitous Remark Concerning Evidence of Other Crimes was Not Cured by the Court's Weak Admonition

It may be recalled that Agent Sandige volunteered the fact that a certain yellow and blue watch cap found at the warehouse was "believed to have been used in another crime" (336-337). We submit that the Court's ensuing admonition, which appears on page 338 of the trial record and is quoted in our review of the evidence above did not cure the damage done by the agent's remark. Rather, we submit, it implied that the agent's statement was true, that appellants' co-defendants who were not on trial were involved in another crime, and that the Court felt they were guilty of the crime on trial.

B. The Court Unfairly Permitted the Government to Elicit Evidence Implying the Recovery at the Scene of the Crime of False Identity Papers Not Connected to the Appellants.

We refer herein to the evidence marshalled in our review of the evidence above pertaining to the baptismal certificate and social security card (326-329, 342-347).

C. The Court Unfairly and Improperly Denied Appellant Ferrante's Motion for a Protective Order

It may be recalled that appellant Ferrante moved for a protective order precluding the Government from cross-examining him with regard

to a misdemeanor stolen properly conviction and that the Court, while eventually disclaiming any reliance on the fact it had granted the same motion with regard to the same conviction in a prior case in which Ferrante was acquitted, clearly stated before denying the motion that it could not disregard that prior experience. We submit that the Court should have granted the application, as it had done before, on its merits. This was a close case. The prior conviction was for a similar crime. It was clearly the type of evidence which "negates credibility only slightly but creates a substantial chance of unfair prejudice" (United States v. Palumbo, 401 F. 2d 270, 273 [2d Cir. 1968], cert. denied, 394 U.S. 947 [1969]; see Luck v. United States, 348 F. 2d 763 [D.C. Cir. 1965]). This was precisely the type of situation where the jury should have had the benefit of appellant Ferrante's testimony (United States v. Coleman, 420 F. 2d 1313 [D.C. Cir. 1969]).

Besides the intrinsic merit of the application for a protective order, we feel that two other factors mark this incident as a deprivation of appellant Ferrante's Due Process rights, which deterred him in the excercise of his right to testify in his own behalf. On is the prejudice displayed by the trial Judge in denying the motion on impermissible, extrajudicial grounds (see United States v. Sclafani, 487 F. 2d 245 [2d Cir. 1973]). A second is the fact that the Court, in denying the motion, stated that it was doing so under Rule 404 (b), presumably as evidence of Ferrante's knowledge of the stolen character of the property (438).

We submit that to have permitted such evidence in the utter absence of any factual similarity between the state misdemeanor and the case at bar would have been clear error (see, generally, 2 Weinstein's Evidence ¶404[09]). We further submit that the net result of this episode, whether the Court intended it or not, was to convey to appellant Ferrante the proposition that if he had the temerity to take the witness stand in his own defense, the Court was going to permit the jury to hear evidence of his propensity to commit the crime charged.

D. The Prosecutor's Improper Concealment of "Jencks Act" Material and the Court's Allowance of Improper Rebuttal Evidence Unfairly "Mousetrapped" Appellant Vescera

It will be recalled that the Government did not turn over to either the court or counsel the reports of the FBI agent who testified at the trial and who had interviewed the witness Silverman until just prior to the time that Silverman took the stand in rebuttal and testified that appellant Vescera looked "similar" to men who rented the trucks from him. We submit that the Government's failure to submit this material to the court for review constituted a violation of 18 U.S.C. §3500 (2). We submit further that the Court indicated that had the Government turned over the reports in question to the Court, the Court would have turned them over to the defense for purposes of cross-examination.

More importantly, however, is the fact that the concealment was obviously done intentionally, with a view towards enticing appellant Vescera to forego his Fifth Amendment privilege and testify. The trap

was then sprung when the Court permitted the witness Silverman to testify to matters that belonged in the Government's case in chief[3]. The sum, we submit, was a violation of appellant Vescera's right against self-incrimination and an interference with his right to prepare his defense.

CONCLUSION

APPELLANTS' CONVICTIONS SHOULD BE REVERSED

Respectfully submitted,

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3. We do not herein otherwise concede in any way the admissibility of Silverman's identification testimony, which we maintain was too weak to outweigh its prejudice and was itself the product of a Due Process violation (Stovall v. Denno, 388 U.S. 293 [1967]).